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No. 98-1311

In the Supreme Court of the United States

OCTOBER TERM, 1998

ROBERT COAL COMPANY, ET AL., PETITIONERS

v.

MICHAEL HOLLAND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
DAVID W. OGDEN
Acting Assistant Attorney General
DOUGLAS N. LETTER
MARK B. STERN
KATHLEEN MORIARTY MUELLER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

2498

QUESTIONS PRESENTED

1. Whether the provisions of the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act), 26 U.S.C. 9701 *et seq.*, that assign responsibility for funding the health-care benefits of retired coal miners and their dependents to the coal mine operators that previously employed the miners pursuant to collective bargaining agreements that promised miners health-care benefits for life, violate the Due Process or Just Compensation Clause of the Fifth Amendment.

2. Whether those provisions of the Coal Act, as applied to this case, violate the doctrine of separation of powers because, before the Coal Act was enacted, petitioner Robert Coal Company entered into a settlement agreement with a union, embodied in a final judgment of a federal district court, limiting its financial exposure for its former employees' health-care benefits.

3. Whether the provisions of the Coal Act establishing a private entity to assess premiums and to administer a health benefit plan for retired coal miners and their dependents, and authorizing that entity to sue to compel compliance with the Act's financing provisions, is consistent with the Appointments Clause of the Constitution.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	11
Conclusion	21

TABLE OF AUTHORITIES

Cases:

Association of Bituminous Contractors, Inc. v. *Apfel*, 156 F.3d 1246 (D.C. Cir. 1998)	9, 10, 14
Auffmordt v. *Hedden*, 137 U.S. 310 (1890)	20
Buckley v. *Valeo*, 424 U.S. 1 (1976)	19
Chateaugay Corp., In re, 53 F.3d 478 (2d Cir.), cert. denied, 516 U.S. 913 (1995)	2-3
Connolly v. *Pension Benefit Guar. Corp.*, 475 U.S. 211 (1986)	8
Eastern Enters. v. *Apfel*, 118 S. Ct. 2131 (1998)	*passim*
Marks v. *United States*, 430 U.S. 188 (1977)	14, 15
Mary Helen Coal Corp. v. *Hudson*, 164 F.3d 624 (4th Cir. 1998)	16
Plaut v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995)	17, 18
United States v. *Germaine*, 99 U.S. 508 (1878)	20
United States v. *Hartwell*, 73 U.S. (6 Wall.) 385 (1868)	20, 21
Unity Real Estate Co. v. *Hudson*, No. 97-3234, 1999 WL 167765 (3d Cir. Mar. 29, 1999)	14

Constitution and statutes:	Page
U.S. Const.:	
Art. II, § 2, Cl. 2 (Appointments Clause)	7, 9, 18, 19, 20
Amend. V	8
Due Process Clause	7, 11
Just Compensation Clause	7, 11
Act of Feb. 25, 1791, ch. 10, § 4, 1 Stat. 192-193	20
Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. 9701 *et seq.*	*passim*
26 U.S.C. 9701(c)	7
26 U.S.C. 9702	4
26 U.S.C. 9711(a)	5
26 U.S.C. 9712(a)(1)	5, 9, 21
26 U.S.C. 9712(a)(2)	5, 21
26 U.S.C. 9712(b)(2)	14
26 U.S.C. 9712(b)(2)(A)	5
26 U.S.C. 9712(b)(2)(B)	5
26 U.S.C. 9712(d)	5
26 U.S.C. 9712(d)(3)	14
Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*:	
29 U.S.C. 1002(1)	5
29 U.S.C. 1002(37)	5
Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.*	19
Labor Management Relations Act of 1947, § 302(c)(5), 29 U.S.C. 186(c)(5)	5
12 U.S.C. 1723(b)	20
20 U.S.C. 1087-2(c)	20
28 U.S.C. 2403(a)	7
Miscellaneous:	
138 Cong. Rec. 5331 (1992)	4

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-3a) is unpublished, but the disposition is available at 1998 WL 794832. The memorandum opinion of the district court (Pet. App. 4a-26a) is reported at 986 F. Supp. 621.

JURISDICTION

The judgment of the court of appeals was entered on October 16, 1998. On January 6, 1999, the Chief Justice entered an order extending the time for filing a petition for a writ of certiorari to and including February 15, 1999 (a federal holiday). The petition for a writ of certiorari was filed on February 16, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act or Act), 26 U.S.C. 9701 *et seq.*, to address a crisis in the funding of two multi-employer welfare benefit plans that paid for the health-care benefits of coal miners, retired miners, and their dependents. Those multi-employer plans, the United Mine Workers of America 1950 Benefit Plan and Trust (1950 Benefit Trust) and the United Mine Workers of America 1974 Benefit Plan and Trust (1974 Benefit Trust), were created and funded through a series of national collective bargaining agreements, known as National Bituminous Coal Wage Agreements (NBCWAs), between the United Mine Workers of America (UMWA) and the Bituminous Coal Operators Association (BCOA). See generally *Eastern Enters.* v. *Apfel*, 118 S. Ct. 2131, 2137-2139 (1998).

Before 1974, a single multi-employer fund was the exclusive source of pension and health-care benefits for United Mine Workers miners, retirees, and their dependents. See *Eastern Enters.*, 118 S. Ct. at 2138-2139. In the 1974 NBCWA, the UMWA and the BCOA agreed to separate that fund into two multi-employer pension funds and two multi-employer welfare benefit funds. Under the 1974 NBCWA, the 1950 Benefit Trust provided health-care benefits to miners who retired before 1976, and the 1974 Benefit Trust provided health-care benefits to both the active work force and to miners who retired in 1976 or thereafter. See *Eastern Enters.*, 118 S. Ct. at 2139. Unlike previous agreements, the 1974 NBCWA expressly stated that miners and their spouses would be entitled to health-care benefits for life. *Ibid.*; *In re Chateaugay Corp.*, 53 F.3d 478, 482 (2d Cir.) (quoting 1974

Agreement's provision that "[a]ny pensioned miner covered in this Plan will retain his Health Services card until death, and upon his death his widow will retain a Health Services card until her death or remarriage"), cert. denied, 516 U.S. 913 (1995).

The structure of the 1950 and 1974 Benefit Trusts was changed in the 1978 NBCWA. In that agreement, employers who were bound by the NBCWA (known as signatory operators) agreed to provide benefits to their active employees and future retirees through individual employer health plans, rather than the 1974 Benefit Trust. The 1974 Benefit Trust was retained as an "orphan" plan designed to provide health-care benefits to post-1975 retirees whose last employer had gone out of business. *Eastern Enters.*, 118 S. Ct. at 2140. The 1978 NBCWA, like the previous one, expressly promised that miners covered by the agreement would receive health-care benefits for life. *Chateaugay*, 53 F.3d at 482.

In the 1980s, the financial stability of the 1950 and 1974 Benefit Trusts was plagued by spiraling health-care costs, the practice of coal operators of "dumping" their retirees into the 1974 Benefit Trust by terminating their individual welfare benefit plans or leaving the coal business, and judicial decisions maintaining the trusts' beneficiary population without corresponding increases in coal operator contributions. The withdrawal of coal operators from the 1950 and 1974 Benefit Trusts forced the remaining participating employers to shoulder increasingly large contribution obligations to pay for not only their own retirees, but also newly "orphaned" retirees whose employers had ceased contributing to the Trusts. Those rising costs, in turn, influenced still-contributing signatory operators to withdraw from the Trusts, thus further shrinking the

trust fund contribution base. *Eastern Enters.*, 118 S. Ct. at 2140. The Trusts' ability to provide health-care benefits was jeopardized, and the issue of retiree health-care benefits contributed to a protracted strike at the Pittston Coal Company. *Ibid.*

2. In March 1990, the Secretary of Labor established the Advisory Commission on United Mine Workers of America Retiree Health Benefits (Coal Commission) to analyze the financial crisis confronting the Trusts and to recommend solutions. *Eastern Enters.*, 118 S. Ct. at 2140-2141. As relevant here, the Coal Commission recommended, as one alternative solution, that current and past signatories to the NBCWAs should bear the cost of providing health-care benefits to "orphaned" retirees whose former employers were no longer in the coal business, as well as to their own retirees. See *id.* at 2141. The Coal Act was based in large part on that alternative recommendation by the Coal Commission. See *ibid.*; 138 Cong. Rec. 5331 (1992) (statement of Sen. Wofford).

The Coal Act was designed to provide stable financing for the health-care benefits of all retired coal miners and their dependents who were covered by either the 1950 or 1974 Benefit Trust, or by an individual employer plan under the NBCWAs. To that end, the Coal Act creates two new, private multi-employer health-care benefit trusts. The first new fund, the United Mine Workers of America Combined Fund (Combined Fund), was the trust at issue in *Eastern Enterprises*; it is not at issue in this case. The Combined Fund was created by the statutory merger of the 1950 and 1974 United Mine Workers Benefit Trusts. It provides benefits to beneficiaries who were receiving (or were eligible to receive) benefits from those trusts as of July 1992. See 26 U.S.C. 9702.

The second fund, the 1992 United Mine Workers Benefit Plan (1992 Plan), is an entirely new entity, and is the fund at issue in this case. The 1992 Plan is designed to provide lifetime health-care benefits to individuals who should receive coverage under an individual employer plan but do not. See 26 U.S.C. 9712(b)(2)(B).[1] To provide financing for benefits under the 1992 Plan, the Coal Act assigns responsibility for funding the health-care benefits of a miner and his dependents to the signatory employer that most recently employed the miner. See 26 U.S.C. 9712(d).

The Coal Act directed the UMWA and the BCOA to create the 1992 Plan as a private multi-employer benefit plan and to appoint its trustees. 26 U.S.C. 9712(a)(1). The Coal Act further provides that the 1992 Plan has the same legal status as any other private multi-employer welfare benefit plan under the Employee Retirement Income Security Act of 1974 (ERISA) and the Labor Management Relations Act of 1947. 26 U.S.C. 9712(a)(2); see 29 U.S.C. 186(c)(5), 1002(1), 1002(37).

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[1] The Coal Act elsewhere requires a mine operator who was providing health-care benefits to a miner or miner's dependents under an individual employer plan maintained under a 1978 or subsequent NBCWA, as of February 1, 1993, to continue to provide such benefits for as long as the operator remains in business. 26 U.S.C. 9711(a). If such an operator goes out of business or does not provide such benefits, a miner eligible to receive benefits from the operator's individual employer plan will receive benefits from the 1992 Plan. See 26 U.S.C. 9712(b)(2)(B). The 1992 Plan also provides health benefits to individuals who, but for the enactment of the Coal Act, would have been eligible to receive benefits under the 1950 or 1974 Benefit Trusts as of February 1993. See 26 U.S.C. 9712(b)(2)(A).

3. From the mid-1970s until 1984, petitioner Robert Coal Company managed and supervised the construction and operation of coal mines in Kentucky that were owned by Leslie Coal Mining Company and McInnes Coal Mining Company. During that period, Robert Coal employed all of the employees at the Leslie and McInnes mines. Some of those employees were miners who were members of, and represented by, the UMWA. Robert Coal Company became a signatory to the 1974, 1978, and 1981 NBCWAs. Pet. App. 9a.

In 1984, the assets of the Leslie and McInnes mines were sold to the Sidney Coal Company. In October 1984, the UMWA filed suit in the United States District Court for the Eastern District of Kentucky against several defendants, including Robert Coal, alleging that the sale of the Leslie and McInnes Mines to Sidney failed to comply with the successorship provisions of the applicable NBCWA. Pet. App. 9a. In May 1988, Robert Coal and the UMWA entered into a settlement agreement, by which Robert Coal agreed to continue providing health-care coverage to its retired miners and other beneficiaries from the Leslie and McInnes Mines until January 31, 1993. *Id.* at 42a-43a. The settlement agreement also stated that Robert Coal would have no responsibility for providing health-care benefits to those former employees after that date. *Id.* at 44a. The district court approved the settlement and entered an order dismissing the case with prejudice. *Id.* at 38a-40a.

From May 1988 through January 1993, Robert Coal provided health-care benefits to approximately 75 persons under the settlement agreement. Robert Coal ceased providing coverage in February 1993. Since that time, the 1992 Plan has provided health benefits to

those persons who previously had received such benefits from Robert Coal. Pet. App. 10a.

4. After the enactment of the Coal Act, the Trustees of the 1992 Plan requested, pursuant to the Act, that Robert Coal pay the premiums for the benefits of its retired employees and other beneficiaries covered under the NBCWAs. When Robert Coal refused to pay those premiums required under the Act, the Trustees filed this action in the United States District Court for the District of Columbia against Robert Coal and the other petitioners (who are "related persons" to Robert Coal within the meaning of the Coal Act, see 26 U.S.C. 9701(c)) to collect premium payments due the 1992 Plan under the Coal Act. Petitioners contended, in response, that the statutory obligation of coal mine operators to finance the 1992 Plan cannot be constitutionally applied to them because of the 1988 order terminating the Kentucky litigation. Petitioners also contended that the Coal Act violated the Due Process and Just Compensation Clauses of the Fifth Amendment and the Appointments Clause. The United States intervened to defend the constitutionality of the Act, pursuant to 28 U.S.C. 2403(a).

On November 17, 1997 (before this Court decided *Eastern Enterprises*), the district court rejected petitioners' constitutional challenges and granted summary judgment for respondents. The district court first rejected petitioners' argument that the Coal Act unconstitutionally disturbed the 1988 settlement and order terminating the Kentucky litigation. The court noted that "the Coal Act does not reimpose on Robert Coal the same obligation that it already satisfied through the settlement of the Kentucky lawsuit. Instead, the Coal Act creates future statutory liability and imposes a new and separate obligation on Robert

Coal." Pet. App. 14a. The court explained that "[t]he fact that the statutory obligations under the Coal Act are similar to or modeled on obligations created by earlier collective bargaining agreements does not mean they are 'arising out of' such earlier agreements, as the settlement agreement provides. By Robert Coal's logic, any entity operating in a highly regulated, national industry would be able to forever insulate itself from future Congressional regulation by settling a contract dispute in federal court." *Ibid.* The court therefore concluded that it need not deal at length with Robert Coal's argument that the Coal Act violates separation of powers principles by interfering with judicial power; because the Coal Act does not disturb the 1988 Kentucky judgment, the court reasoned, there has been no legislative interference with judicial powers. *Id.* at 13a-15a.

The district court also concluded that the liability imposed on petitioners by the Coal Act does not contravene the Fifth Amendment. The court observed that economic legislation "satisfies the requirements of due process so long as it is rationally related to a legitimate government purpose." Pet. App. 16a. It noted that Robert Coal "contributed to a reasonable expectation of lifetime health benefits" on behalf of its retired employees, *id.* at 18a-19a, and rejected petitioners' argument that the settlement agreement terminating the Kentucky litigation made their situation unique and conferred on them a constitutional immunity from the application of the Coal Act, *id.* at 19a. As for petitioners' claim that the Coal Act effected an uncompensated taking, the court sustained the Act under this Court's three-factor test, set forth in *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986), for determining whether a regulatory mea-

sure gives rise to a taking. The court noted in particular that petitioners' obligations to the 1992 Plan are "reasonable and directly proportional to its liability under the previous funds," Pet. App. 21a, that Robert Coal had signed several NBCWAs which promised miners health benefits for life, *id.* at 21a-22a, and that the Coal Act does not appropriate private property to the benefit of the government itself, but rather readjusts private economic benefits and burdens, *id.* at 23a.

Finally, the district court rejected petitioners' challenge under the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, to the composition of the Board of trustees of the 1992 Plan. The court ruled that the trustees of the 1992 Plan are not "Officers of the United States" subject to the Appointments Clause because they hold no office or employment relationship with the federal government. Rather, the trustees are private individuals, and the Coal Act expressly provides the 1992 Plan is a "private plan." Pet. App. 25a; see 26 U.S.C. 9712(a)(1). "The 1992 Plan operates like any other private multiemployer benefit plan, differing only in that the obligation imposed on signatory operators to contribute stems from a statutory as opposed to contractual obligation." Pet. App. 25a. Although the trustees exercise significant authority, "what is relevant is that they do not exercise significant *governmental* authority." *Ibid.*

5. In an unpublished decision, the court of appeals affirmed "substantially for the reasons stated in the district court's memorandum opinion." Pet. App. 1a. The court of appeals further noted (*id.* at 2a) that its recent decision in *Association of Bituminous Contractors, Inc.* v. *Apfel*, 156 F.3d 1246 (D.C. Cir. 1998) *(ABC)*, "provides further support for the district

court's holding." In the *ABC* case, the court of appeals rejected a due process challenge brought by companies that had been signatories to the 1974 and 1978 NBCWAs to their statutory obligation under the Coal Act to contribute to the Combined Fund, see *ABC*, 156 F.3d at 1255-1258, and held that the structure of the Combined Fund "constituted a rational legislative scheme to ensure that the cost of providing health benefits be placed on the operators that had created the expectation of those benefits." Pet. App. 2a. In this case, the court found "no constitutionally significant difference between the Combined Fund and the 1992 Benefit Plan." *Ibid.*

The court then noted petitioners' argument that "the trustees of the 1992 Benefit Plan are essentially tax assessors and currently exercise their functions in violation of the Appointments Clause." Pet. App. 2a. The court suggested that the "core" of this argument, "as elaborated at oral argument, is that the Congress cannot delegate its taxing power to a private entity." *Ibid.* The court declined to address that argument, because it concluded that "the parties did not raise or argue the non-delegation doctrine in this appeal." *Ibid.*

Finally, the court rejected petitioners' claim that the Coal Act effected an unconstitutional taking. Pet. App. 3a. The court stated that, in *Eastern Enterprises*, "five justices determined that the Takings Clause was not the proper paradigm for analyzing the Act's retroactive effects on coal operators." *Ibid.* (citing *Eastern Enters.*, 118 S. Ct. at 2155-2158 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 2161-2164 (Breyer, J., dissenting)).

ARGUMENT

1. Petitioners contend (Pet. 10-16) that the obligations imposed on them under the Coal Act to finance the health-care benefits of their former employees (and the employees' dependents) violate the Due Process and Just Compensation Clauses of the Fifth Amendment. They contend, in particular, that the court of appeals improperly refused to follow *Eastern Enterprises* v. *Apfel*, 118 S. Ct. 2131 (1998), which held the Coal Act unconstitutional as applied to the coal mine operator that challenged the Act in that case. Those contentions are without merit. Petitioners' situation is fundamentally different from the position of the coal operator before the Court in *Eastern Enterprises*, because, unlike that operator, petitioner Robert Coal Company signed collective bargaining agreements that expressly promised its employees health-care benefits for life. The decision below therefore creates no inconsistency with *Eastern Enterprises*. The result reached by the courts below is also correct under well-settled just compensation and due process principles, and it does not conflict with any decision of any other court of appeals. Further review is therefore not warranted.

a. In *Eastern Enterprises*, a divided Court held that the Coal Act was unconstitutional as applied to a coal mine operator that signed NBCWAs in effect between 1947 and 1964, but ceased coal mining operations in 1965. See *Eastern Enters.*, 118 S. Ct. at 2142-2143 (plurality opinion) (recounting the history of Eastern's involvement in the coal business). The Coal Act obligated Eastern to pay premiums to the Combined Fund to cover the health benefits of more than 1000 retired miners who had worked for the company before 1966, and their dependents. *Id.* at 2143 (plurality opinion).

Eastern alleged that the Coal Act violated substantive due process as applied to it and effected an unconstitutional taking of its property without just compensation by retroactively creating an obligation to finance the benefits of miners who, when employed by Eastern, had no expectation that they would receive open-ended health-care benefits at Eastern's expense. *Ibid.*

The plurality concluded that the application of the Coal Act to Eastern effected an unconstitutional taking without just compensation. See 118 S. Ct. at 2146-2153. Applying the Court's three-factor test for analyzing regulatory taking claims (*id.* at 2149-2153), the plurality found a constitutional problem as to each factor. In particular, the plurality found it significant that the Coal Act imposed liability on Eastern for lifetime health-care benefits even though Eastern had withdrawn from the coal industry before any of the NBCWAs had promised lifetime benefits to the miners. See *id.* at 2150 (with respect to the burden placed on Eastern, noting that Eastern "had no control over the activities of its former employees subsequent to its departure from the coal industry in 1965"); *id.* at 2152 (with respect to investment-backed expectations, stressing that Eastern never participated in an industry-wide agreement creating expectations of lifetime benefits); *id.* at 2152-2153 (with respect to the nature of the governmental action at stake, stating that "Eastern cannot be forced to bear the expense of lifetime health benefits for miners based on its activities decades before those benefits were promised").

Justice Kennedy, concurring in the judgment and dissenting in part, disagreed with the plurality's conclusion that the Coal Act should be analyzed as a taking, see 118 S. Ct. at 2154-2158, but concluded that the application of the Coal Act to Eastern violated

"accepted principles" of substantive due process inhibiting the operation of severely retroactive laws, *id.* at 2158-2160. Justice Kennedy noted that "the imposition of liability on former employers based on past employment relationships" may be upheld under due process principles as remedial legislation designed to allocate properly the costs of the employer's business. *Id.* at 2159. He concluded, however, that the Coal Act did not serve that purpose as applied to Eastern because, although "Eastern was once in the coal business and employed many of the beneficiaries, but it was not responsible for their expectation of lifetime health benefits or for the perilous financial condition of the 1950 and 1964 Plans which put the benefits in jeopardy. * * * [T]he expectation was created by promises and agreements made long after Eastern left the coal business." *Ibid.*

Four Justices dissented, and concluded that the Coal Act, as applied to Eastern, was not unconstitutional under either due process principles or just compensation principles. *Eastern Enters.*, 118 S. Ct. at 2161-2168. The four dissenters also agreed with Justice Kennedy that the Coal Act should not be analyzed as a taking at all. *Id.* at 2161-2164.

b. Although the Court in *Eastern Enterprises* did not arrive at a single rationale for finding the Coal Act unconstitutional as applied to Eastern, both opinions supporting the judgment in that case emphasized the fact that Eastern left the coal industry before any collective bargaining agreement gave miners an expectation of lifetime health-care benefits. This case, by contrast, presents a factual situation in which the coal operator signed NBCWAs promising its employees lifetime benefits. The result reached by the Court in *Eastern Enterprises* therefore does not govern here.

To the contrary, as the court of appeals observed in its earlier decision in *Association of Bituminous Contractors* v. *Apfel*, 156 F.3d 1246 (D.C. Cir. 1998), both the plurality and Justice Kennedy accepted in *Eastern Enterprises* that the 1974 and subsequent NBCWAs "created an expectation of lifetime benefits that the employers who participated in those agreements were responsible for creating." 156 F.3d at 1256. Thus, "the clear implication of each opinion in *Eastern Enterprises* is that employer participation in the 1974 and 1978 agreements represents a sufficient amount of past conduct to justify the retroactive imposition of Coal Act liability." *Id.* at 1257; see also *Unity Real Estate Co.* v. *Hudson*, No. 97-3234, 1999 WL 167765, at *9 (3d Cir. Mar. 29, 1999), ("Language in the plurality and the concurrence [in *Eastern*] suggest[s] that expectations fundamentally changed after 1974.").[2]

Petitioners are incorrect in contending (Pet. 13-14) that the court of appeals' reliance on the plurality opinion and Justice Kennedy's opinion in *Eastern Enterprises* to reject their due process challenge is inconsistent with *Marks* v. *United States*, 430 U.S. 188 (1977). *Marks* addresses the situation where a concurring opinion in this Court reaches the same result as that reached by a plurality of the Justices, but on narrower grounds. In that situation, a lower court should follow the reasoning of the concurring opinion,

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[2] Moreover, while the Coal Act required Eastern to begin paying premiums to the Combined Fund in 1993, even though the company had not contributed to the United Mine Workers Benefit Plans since 1965, the Act requires Robert Coal to finance (through premiums to the 1992 Plan) the health benefits of retirees who were covered by that company through January 31, 1993. See p. 6, *supra*; 26 U.S.C. 9712(b)(2) and (d)(3); cf. *Eastern Enters.*, 118 S. Ct. at 2150-2151.

because the lower court may conclude that a majority of this Court agrees with the narrower position reached by the concurrence. *Id.* at 193. To the extent that *Marks* provides any guidance here, it supports the court of appeals' rejection of petitioners' due process challenge. Even though the plurality and concurrence in *Eastern Enterprises* analyzed that case under different legal frameworks, those opinions agreed on the constitutional significance of a particular fact, namely, that Eastern left the coal indusry before 1974, when the NBCWAs began expressly stating that retired miners would receive health benefits for life. Both the plurality and Justice Kennedy concluded that the crucial constitutional problem in *Eastern Enterprises* was the Coal Act's application to an operator that had never signed a wage agreement promising lifetime benefits, and both found that situation distinguishable from the one where an operator had signed such an agreement. See pp. 11-13, *supra*.

Petitioners argue further (Pet. 13-15) that *Marks* does not support the court of appeals' rejection of its challenge to the application of the Coal Act as a taking without just compensation. They argue that, even though Justice Kennedy and the four dissenting Justices in *Eastern Enterprises* agreed that the Coal Act should not be analyzed as a taking at all, *Marks* does not permit a lower court to combine a concurrence and a dissent into a controlling majority of this Court. This case, however, does not present an appropriate circumstance for the Court to decide whether a concurrence and a dissent in a decision without a single opinion joined by a majority of the Court may be combined to form a "*Marks* majority." For the reasons given above, petitioners' taking claim fails under the reasoning of the plurality opinion in *Eastern Enter-*

prises, which emphasized that Eastern—unlike the coal companies that signed the 1974 and later NBCWAs—never contributed towards any reasonable expectation of lifetime health benefits on the part of coal miners. On the question of a taking, therefore, the plurality opinion and Justice Kennedy's concurrence form a "*Marks* majority" sufficient to reject petitioners' claim, and it is not necessary to rely on the dissenting opinion in *Eastern Enterprises*.[3]

2. Petitioners contend (Pet. 16-20) that the Coal Act as applied to them violates the doctrine of separation of powers because it supposedly nullifies a district court judgment entered after petitioners settled private litigation against the UMWA concerning health-care benefits for its employees. That contention is without merit.

The 1988 resolution of the Kentucky litigation determined the extent of Robert Coal Company's contractually based responsibility under its collective bargaining agreements with the UMWA. The union had sued Robert Coal and others, alleging that the sale of the assets of the Leslie and McInnes Mines had violated successorship clauses in the 1981 and 1984 collective bargaining agreements. See Pet. App. 9a. Robert Coal and the other defendants in that action did not admit any liability, but they settled the dispute by agreeing to pay for health benefits for certain retired miners

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[3] Because this case is materially different from *Eastern Enterprises*, there is no merit to petitioners' contention (Pet. 15) that the court of appeals' decision conflicts with *Mary Helen Coal Corp.* v. *Hudson*, 164 F.3d 624 (4th Cir. 1998) (Table). In that case, the Fourth Circuit ruled, in an unpublished decision, that the Coal Act was unconstitutional as applied to a company that was "materially indistinguishable from Eastern." *Mary Helen Coal Corp.* v. *Hudson*, No. 97-2331, 1998 WL 708637, at *1 (Sept. 24, 1998).

through January 1993. See *id.* at 9a, 42a-47a. In particular, the settlement agreement released Robert Coal from any duty to provide further benefits "arising out of any Wage Agreement." *Id.* at 44a. The district court in Kentucky then approved the settlement and dismissed the case with prejudice. See *id.* at 40a.

The Coal Act does not "nullify" or alter the effect of the settlement agreement entered in the Kentucky litigation, for it "does not reimpose on Robert Coal the same obligation that it already satisfied through the settlement of the Kentucky lawsuit. Instead the Coal Act creates future statutory liability and imposes a new and separate obligation on Robert Coal." Pet. App. 14a. As the district court explained (*ibid.*): "There is no question that the settlement agreement terminated Robert Coal's *contractual* obligation to contribute to the [United Mine Workers] 1950 and 1974 Benefit Plans as of January 1993. The Coal Act, however, imposes a *statutory* obligation on Robert Coal to contribute to the new Combined Fund [*sic*: 1992 plan] as of February 1993."

The crucial difference between contractual and statutory obligations explains why *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), on which petitioners rely (see Pet. 17-20), does not govern this case. *Plaut* involved an amendment to the securities laws passed by Congress to require the federal courts to reinstate private securities actions that had previously been dismissed as time-barred based on this Court's interpretation of the applicable statute of limitations. This Court held in *Plaut* that Congress's direction to the federal courts to reopen and rehear cases that had been litigated to final judgment violated the doctrine of separation of powers because "it does no more and no less than reverse a determination once made, in a

particular case." 514 U.S. at 225 (internal quotation marks omitted). The Court explained that "Congress may not declare by retroactive legislation that the law applicable to *that very case* was something other than what the courts said it was." *Id.* at 227.

The Coal Act's application to petitioners does not implicate the constitutional concerns expressed in *Plaut*. Congress did not compel any court to reopen, readjudicate, or otherwise disturb the Kentucky settlement or judgment. Nor did Congress require the federal courts to apply different law in the Kentucky litigation between Robert Coal and the UMWA than the law that the courts had previously applied. Indeed, the Coal Act does not concern the law applied in the Kentucky litigation at all. Rather, Congress enacted an entirely new statutory scheme that imposed a new form of liability on petitioners.[4] Moreover, petitioners' funding obligation under the Coal Act runs not to the UMWA, which was the plaintiff in the Kentucky litigation, but to a different entity, the 1992 Plan. That funding obligation therefore does not offend the separation of powers.

3. Petitioners argue (Pet. 20-24) that the trustees of the 1992 Plan were appointed in violation of the Appointments Clause of the Constitution (Art. II, § 2, Cl. 2). The court of appeals declined to address that issue, for it concluded that the Appointments Clause

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[4] Contrary to petitioners' assertions (Pet. 19), the fact that Robert Coal's statutory obligations under the Coal Act are similar to its obligations under the previous collective bargaining agreements and court-approved settlement agreement is irrelevant. As the district court recognized, that logic, if adopted, would allow "any entity operating in a highly regulated, national industry" to "forever insulate itself from future Congressional regulation by settling a contract dispute in federal court." Pet. App. 14a.

claim had not been adequately preserved on appeal. Pet. App. 2a. Petitioners argue that they did properly preserve their Appointments Clause claim. The claim in any event does not warrant further review, for the district court correctly ruled that the Coal Act is consistent with that Clause. *Id.* at 24a-25a.

Petitioners' argument that the trustees must be appointed pursuant to the Appointments Clause is based on a misreading of the Court's statement in *Buckley* v. *Valeo*, 424 U.S. 1, 126 (1976) (per curiam), that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by [the Appointments Clause.]" Petitioners note that the Coal Act authorizes the trustees to administer the 1992 Plan and to sue to recover on coal operators' obligations to the 1992 Plan under the Coal Act; they assert that such responsibilities constitute the exercise of "significant government authority" that may be exercised only by properly appointed Officers of the United States. Pet. 22. That argument fails because the Appointments Clause does not address Congress's power to assign functions to *private* entities or the manner in which officers of such entites may be selected. The Clause governs only the manner of selection of "Officers *of the United States.*" U.S. Const. Art. II, § 2, Cl. 2 (emphasis added).

In *Buckley*, the Court invalidated provisions of the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.*, that provided for congressional appointment of members of the Federal Election Commission, a federal agency with responsibility for administering and enforcing the FECA. See 424 U.S. at 109-143. But *Buckley* does not stand for the proposition that every individual who exercises significant

authority within a legal framework created by Congress is transformed into an "Officer of the United States" within the meaning of the Appointments Clause. Rather, an "Officer of the United States" is one who exercises significant authority on behalf of the United States government and who has a continuing and formalized relationship of employment with the United States Government. See *Auffmordt* v. *Hedden*, 137 U.S. 310, 327 (1890) (merchant appraiser was not an "Officer" for purposes of the Appointments Clause because his position was without tenure, duration, continuing emolument, or continuous duties); *United States* v. *Germaine*, 99 U.S. 508, 511-512 (1878) (surgeon appointed by Commissioner of Pensions was not an "Officer" because his duties were not continuing and permanent); *United States* v. *Hartwell*, 73 U.S. (6 Wall.) 385, 393 (1868) ("An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties. The employment of the defendant was in the public service of the United States."). And Congress has frequently created private entities with significant responsibilities under federal statutes, such as government-sponsored private corporations, without requiring that officers and directors of those entities be appointed pursuant to the Appointments Clause. See, *e.g.*, 12 U.S.C. 1723(b) (14 of 18 directors of Federal National Mortgage Association elected by common stockholders); 20 U.S.C. 1087-2(c) (similar; Student Loan Marketing Association); see also Act of Feb. 25, 1791, ch. 10, § 4, 1 Stat. 192-193 (providing for election of directors of Bank of the United States by stockholders).

The trustees of the 1992 Plan do not fall within the Appointments Clause because they do not hold any

office or employment relationship with the United States Government. The Coal Act expressly provides that the 1992 Plan is a "private plan." 26 U.S.C. 9712(a)(1). The Act further provides that the 1992 Plan has the same legal status as any other private multi-employer welfare benefit plan under the Employee Retirement Income Security Act and the Labor Management Relations Act. 26 U.S.C. 9712(a)(2). Once established, the 1992 Plan operates like any other private multi-employer benefit plan; it substantively differs from other plans only in that the obligation of signatory operators to contribute derives from statutory command rather than contractual agreement. Thus, the Coal Act does not create a "public station" or "employment" (*Hartwell*, 73 U.S. (6 Wall.) at 393), and the trustees do not hold federal office any more than do the trustees of any other private multi-employer benefit plan.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
DAVID W. OGDEN
Acting Assistant Attorney General
DOUGLAS N. LETTER
MARK B. STERN
KATHLEEN MORIARTY MUELLER
Attorneys

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